Perspektif Masa Sdn Bhd v Sabah Development Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCVC)-549–04 OF 2024
CHE MOHD RUZIMA, AZMI ARIFFIN AND NOORIN BADARUDDIN JJCA
15 NOVEMBER 2024

Banking — Banks and banking business — Guarantees — Main contractor in construction project called for payment under bank guarantee ('BG') upon completion of project — Whether bank did not act unconscionably when it paid out the guaranteed sum — Whether BG was unconditional and 'on-demand' and did not require bank to investigate or inquire into propriety of beneficiary's claim — Whether bank's obligation to honour call on BG was unaffected by existence of any dispute between main contractor and its employer

The appellant had appointed a main contractor to carry out a development project. On the appellant's request, the respondent, which funded the project, provided bank guarantees ('BGs') undertaking to pay the main contractor RM476m ('the guaranteed sum') upon completion of construction of various phases of the project. A contractual pre-requisite for the making of a demand for payment under the BGs was the issuance of a certificate of practical completion ('CPC') by the project consultant/project architect. Upon issuance of the requisite CPC, the main contractor demanded payment of the guaranteed sum and the respondent honoured the same. The respondent then sought reimbursement from the appellant. Unable to comply with the reimbursement demand, the appellant negotiated for more time and also came up with various settlement proposals, all of which came to naught. When the respondent finally gave notice that it would recall the credit/loan facilities and enforce the collateral securities, the appellant filed suit and simultaneously sought an interim injunction to restrain the respondent from enforcing the securities and from initiating any winding up action against the appellant. The appellant managed to obtain an ex parte injunction but it was set aside at the inter partes hearing thereof after the High Court judge found that the appellant had not raised any serious issues to be tried, that the respondent had not acted unconscionably in honouring the call on the BGs and that the appellant had not made full and frank disclosure of material facts when it obtained the ex parte injunction. The court further found that the BGs were unconditional and payable on demand without requiring the respondent to investigate or make inquiries about the propriety of the beneficiary's claim. In the instant appeal against the decision, the appellant complained that the CPC was irregular because several of the works done were allegedly defective/incomplete; that the call on the BGs was, accordingly,

unconscionable and that the appellant would suffer irreparable damage if the respondent was allowed to enforce the collateral securities which the appellant had provided to secure the grant of the credit/loan facilities.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) The appellant's case did not have any bona fide serious questions to be tried to warrant an injunction to be granted (see para 32).

(2) The respondent was not party or privy to the underlying contract between the appellant and the beneficiary and had no duty to investigate any 'irregularities', if any, in the issuance of the CPC by the project's architect before paying out under the BGs. Once the beneficiary made the demand, the respondent was bound to make the necessary payment (see para 33).

(3) During the almost four years between the time payment was made to the beneficiary under the BGs and the appellant's filing of the suit against the respondent, the appellant never raised any complaint, protest or grievance about alleged irregularities in the CPC or about the payment made by the respondent under the BGs; nor did it file any injunction to restrain the payment or receipt of the sum guaranteed under the BGs. As rightly found by the High Court judge, the appellant had failed to prove that the call on the BGs was unconscionable (see paras 36 & 42).

(4) When the appellant applied for the ex parte injunction, it intentionally omitted to disclose the fact that the BGs were unconditional and payable on-demand and that the respondent was not required to investigate or concern itself with the propriety of the beneficiary's claim. The appellant also failed to disclose that it was in default at the material time and that its negotiations for settlement with the respondent had failed. The failure to reveal these material facts was solely done to protect its own interests and not done in good faith. The appellant did not come to court with clean hands and was therefore not entitled to seek the aid of the court. The balance of convenience lay with the respondent for the injunction to be refused (see paras 43–44 & 46).

[Bahasa Malaysia summary

Perayu telah melantik kontraktor utama untuk menjalankan projek pembangunan. Atas permintaan perayu, responden, yang membiayai projek tersebut, memberikan jaminan bank ('BG') yang berakujanji untuk membayar kontraktor utama RM476 juta ('jumlah dijamin') selepas siap pembinaan pelbagai fasa projek tersebut. Prasyarat kontrak untuk membuat tuntutan pembayaran di bawah BG adalah pengeluaran sijil perakuan siap kerja ('CPC') oleh perunding projek/arkitek projek. Selepas pengeluaran CPC yang diperlukan, kontraktor utama menuntut pembayaran jumlah yang dijamin

dan responden melunaskannya. Responden kemudiannya meminta pembayaran balik daripada perayu. Tidak dapat mematuhi tuntutan pembayaran balik, perayu berunding untuk lebih masa dan juga mengemukakan pelbagai cadangan penyelesaian, yang semuanya tidak menjadi. Apabila responden akhirnya memberi notis bahawa ia akan menarik balik kemudahan kredit/pinjaman dan menguatkuasakan sekuriti cagaran, perayu memfailkan saman dan pada masa yang sama memohon injunksi interim untuk menghalang responden daripada menguatkuasakan sekuriti dan daripada memulakan sebarang tindakan penggulungan terhadap perayu. Perayu berjaya mendapatkan injunksi ex parte tetapi ia telah diketepikan pada perbicaraan inter-partes selepas hakim Mahkamah Tinggi mendapati perayu tidak membangkitkan sebarang isu serius untuk dibicarakan, bahawa responden tidak bertindak secara tidak wajar dalam melunaskan panggilan ke atas BG dan bahawa perayu tidak membuat pendedahan penuh dan terus terang tentang fakta material apabila ia memperoleh injunksi ex parte. Mahkamah selanjutnya mendapati bahawa BG adalah tidak bersyarat dan perlu dibayar atas permintaan tanpa memerlukan responden untuk menyiasat atau membuat pertanyaan tentang kewajaran tuntutan benefisiari. Dalam rayuan semasa terhadap keputusan itu, perayu mengadu bahawa CPC adalah tidak teratur kerana beberapa kerja yang dilakukan didakwa defektif/tidak lengkap; bahawa panggilan ke atas BG adalah, sewajarnya, tidak wajar dan perayu akan mengalami kerugian yang tidak boleh diperbaiki jika responden dibenarkan untuk menguatkuasakan sekuriti cagaran yang telah disediakan oleh perayu untuk mendapatkan pemberian kemudahan kredit/pinjaman.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Kes perayu tidak mempunyai sebarang persoalan serius yang bona fide untuk dibicarakan bagi menjamin injunksi diberikan (lihat perenggan 32).

(2) Responden bukanlah pihak atau privi kontrak asas antara perayu dan benefisiari dan tidak mempunyai kewajipan untuk menyiasat apa-apa 'kejanggalan', jika ada, dalam pengeluaran CPC oleh arkitek projek sebelum membayar di bawah BG. Sebaik sahaja benefisiari membuat tuntutan, responden terikat untuk membuat bayaran yang diperlukan (lihat perenggan 33).

(3) Dalam tempoh hampir empat tahun antara masa pembayaran dibuat kepada benefisiari di bawah BG dan pemfailan saman perayu terhadap responden, perayu tidak pernah membangkitkan sebarang aduan, bantahan atau rungutan tentang dakwaan kecacatan dalam CPC atau mengenai bayaran yang dibuat oleh responden di bawah BG; ia juga tidak memfailkan sebarang injunksi untuk menghalang pembayaran atau penerimaan jumlah yang dijamin di bawah BG. Seperti yang telah

diputuskan dengan betul oleh hakim Mahkamah Tinggi, perayu telah gagal membuktikan bahawa panggilan ke atas BG adalah tidak wajar (lihat perenggan 36 & 42).

(4) Apabila perayu memohon injunksi ex parte, ia dengan sengaja tidak mendedahkan fakta bahawa BG adalah tidak bersyarat dan perlu dibayar atas permintaan dan bahawa responden tidak perlu menyiasat atau mengambil berat tentang kewajaran tuntutan benefisiari. Perayu juga gagal untuk mendedahkan bahawa ia telah ingkar pada masa yang material dan bahawa rundingannya untuk penyelesaian dengan responden telah gagal. Kegagalan untuk mendedahkan fakta material ini semata-mata dilakukan untuk melindungi kepentingannya sendiri dan tidak dilakukan dengan niat baik. Perayu tidak hadir ke mahkamah dengan jujur dan oleh itu tidak berhak untuk mendapatkan bantuan mahkamah. Imbangan kemudahan terletak pada responden untuk injunksi itu ditolak (lihat perenggan 43–44 & 46).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241; [1995] 1 CLJ 461, SC (folld)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)

Cheah Swee Fah v Bank Bumiputra Malaysia Bhd & Anor [2007] 7 MLJ 481, CA (refd)

Karya Lagenda Sdn Bhd v Kejuteraan Bintai Kindenko Sdn Bhd & Anor [2008] 6 MLJ 636; [2009] 2 CLJ 1, FC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316, CA (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1; [2012] 3 CLJ 401, FC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19

Appeal from: *Perspektif Masa Sdn Bhd v Sabah Development Bank Bhd* [2024] MLJU 1267 (High Court, Shah Alam)

Kamaruzaman bin M Arif (with Zamani bin Ibrahim, Sofiah bt Omar and Siti Nabila Huda bt Jasmani) (Kamaruzaman Arif & Sofiah) for the appellant.

Marianne Loh Suet May (with Jay Koh Mui Woon) (Shook Lin & Bok) for the respondents.

Azmi Ariffin JCA:

INTRODUCTION

[1] Enclosure 53 dated 1 April 2024 is the appellant/plaintiff notice of appeal to this honourable court against the Shah Alam High Court decision delivered on 26 March 2024 in dismissing the appellant's injunction application (encl 3) to restrain the respondent/defendant from enforcing the loan and security documents against the appellant following its default, with costs of RM5,000 subject to allocator.

[2] For convenience, we will refer the appellant as the plaintiff and the respondent as the defendant.

BACKGROUNDS FACTS

[3] The plaintiff is the developer of a housing and commercial development project known as Cadangan Membina 5 Blok 38 Tingkat 1,099 Unit Rumah Pangsa Kos Tinggi dan 23 Unit Kedai 4 Tingkat yang Mengandungi Kemudahan Tadika, Dewan Serbaguna, Surau Serta 4 Tingkat Podium Tempat Letak Kereta dan Rekreasi Dengan 1 Tingkat Basemen di atas Lot 3901 HS(D) 61423, Jalan Aman Fasa III (KG Berembang), Mukim Ulu Klang, Daerah Gombak, Selangor Darul Ehsan) ('the project').

[4] The defendant provided credit facilities for the plaintiff's development projects including the project, Kemensah Townhouse Project and the Pangsapuri Berembang Indah Project.

[5] By way of a letter of award dated 31 December 2013, the plaintiff appointed China Railway Engineering Corp (M) Sdn Bhd and Bismark Construction & Engineering Sdn Bhd as the main contractor for the project for a sum of RM1,062,500,000.

[6] The defendant provided the following credit facilities to the plaintiff's development projects:

(a) RM30m credit facilities dated 16 January 2007 to part finance the preliminary expenses, earth works and show houses pertaining to Kemensah Mixed Development project comprising of 72 unit of two-storey townhouses and 91 units of three and a half-storey Superlink Terraced Houses on land identified as Lots PT 2499–PT 2631, Mukim Hulu Kelang, Daerah Gombak;

(b) RM125m credit facilities dated 15 June 2007 to finance the payment to Permodalan Negeri Selangor Berhad comprising of land compensation

in respect of the joint development on the land known as Perumahan Jalan Aman Fasa III (Kg Berembang) Mukim Hulu Klang, District of Gombak, to part finance the preliminary expenses, pre-development cost, earth works and the low-cost housing construction pertaining to the project and to part finance the plaintiff's development and construction of the Festa Condominium and balance RM35m for the payment of interest in arrears of the RM125m credit facilities;

(c) RM104.1m term loan facility dated 10 December 2018 to be utilised to settle interest, fees, penalties and other charges (including legal fees, costs and charges) outstanding or due and payable for credit facilities ie, RM30m credit facilities, RM125m credit facilities, RM476m bank guarantee facilities, RM476m term loan facility and RM235m term loan facility; and

(d) RM235m term loan facility dated 6 August 2020 to fully settle the principal outstanding and partial settlement of the interest and other charges for the RM30m credit facilities and RM125m credit facilities,

(collectively referred to as 'loan facility').

[7] Following to the credit facilities listed above, the plaintiff had executed the following documents:

(a) RM30m credit facilities:

(i) letter of offer dated 16 January 2007;

(ii) loan agreement dated 2 March 2007;

(iii) memorandum of charge over deposits dated 2 March 2007;

(iv) letter of set off dated 2 March 2007;

(v) debenture dated 2 March 2007;

(vi) project proceeds assignment dated 2 March 2007;

(vii) deed of subordination dated 2 March 2007;

(viii) joint and several guarantee dated 2 March 2007;

(ix) supplemental loan agreement dated 2 April 2007;

(x) second supplemental loan agreement dated 1 August 2008;

(xi) third supplemental loan agreement dated 23 September 2010;

(xii) fourth supplemental loan agreement dated 1 October 2010;

(xiii) revised letter of offer dated 4 May 2012; and

(xiv) revised letter of offer dated 10 December 2018.

(b) RM125m credit facilities:

(i) letter of offer dated 15 June 2007;

(ii) loan agreement dated 23 July 2007;

(iii) debenture dated 23 July 2007;

(iv) revised letter of offer dated 26 July 2011;

(v) supplemental loan agreement dated 5 September 2011;

(vi) revised letter of offer dated 5 September 2013; and

(vii) second supplemental loan agreement dated 7 September 2013.

(c) RM104m term loan facility:

(i) letter of offer dated 10 December 2018;

(ii) revised letter of offer dated 6 August 2020; and

(iii) facility agreement dated 16 March 2021.

(d) RM235m term loan facility:

(i) letter of offer dated 6 August 2020; and

(ii) revised letter of offer dated 17 May 2021.

(e) power of attorney:

(i) power of attorney dated 19 May 2021 for the title held under PN111756, Lot 126399, Seksyen 3, Bandar Ulu Kelang, Daerah Gombak, Negeri Selangor;

(ii) power of attorney dated 19 May 2021 for the title held under PN117433, Lot 126407, Seksyen 2, Bandar Ulu Kelang, Daerah Gombak, Negeri Selangor; and

(iii) power of attorney dated 19 May 2021 for the title held under HS(D) 81831PT 5243 Bandar Ulu Kelang, Daerah Gombak, Selangor,
(collectively referred to as 'security agreements')

[8] For the purpose of the project, the defendant undertook to guarantee a sum of RM476m in the form of bank guarantee comprising of the following:

(a) RM108m bank guarantee (1);

(b) RM118,0000 bank guarantee (2);

(c) RM115m bank guarantee (3); and

(d) RM135m bank guarantee (4),
(collectively referred to as 'bank guarantee')

Issuance of the bank guarantee:

(i) bank guarantee (1) to be issued in favour of main contractor to guarantee payment for the construction and completion of Festa Block E of the project;

(ii) bank guarantee (2) to be issued in favour of main contractor to guarantee payment for the construction and completion of Festa Block C of the project;

(iii) bank guarantee (3) to be issued in favour of main contractor to guarantee payment for the construction and completion of Festa Block A of the project; and

(iv) bank guarantee (4) to be issued in favour of main contractor to guarantee payment for the construction and completion of Festa Integrated Podium of the project.

Conditions for issuance of bank guarantee:

The bank guarantee facilities shall be used solely for issuance of bank guarantee favouring the main contractor in respect to the construction of Festa Blocks E, C, A and Integrated Podium of the project:

– Written request for issuance of the bank guarantee shall be delivered by the plaintiff to the defendant not less than seven (7) days banking days before the date on which the guarantee is required to be issued;

– The plaintiff shall provide the defendant with a duly executed and stamped Letter of Indemnity in favour of the defendant substantially in form and substance acceptable to the defendant together with its request and a sample format for the issuance of the bank guarantee.

– Issuance of the bank guarantee shall be made upon the plaintiff achieving total combined sales of RM595m on Blocks E, C and A of the project. The sales are to be evidenced by way of submission of duly executed and stamped Sales and Purchase agreement between the plaintiff and the purchasers of the project.

[9] Bank guarantee (1), (2) and (3) shall only be called upon receipt and/or comply with the following from the plaintiff or the respective contractor:

(a) a certified true copy of the certificate of practical completion issued by the project consultant/project architect prior to the expiry date of each of the respective BG issued.

(b) any other conditions as deemed necessary by the defendant.

[10] Bank guarantee (4) shall only be called upon receipt and/or comply with the following from the plaintiff or the respective contractor:

(a) a certified true copy of the partial certificate of practical completion issued by the project consultant/project architect prior to the expiry date of each of the respective BG issued;

(b) the construction progress for Block A, Block C and Block E shall have reached 21st Floor, 17th Floor and 13th Floor respectively as certified by the project consultant/project architect; and

(c) the external works for road works, surface water drainage works and sewerage works shall have been completed as certified by the project consultant/project architect.

[11] Bank guarantee (1) to (4) are payable upon the certificate of practical completion ('CPC') issued to the main contractor. Pursuant to the terms of the letter of award dated 31 December 2013 between the main contractor and the plaintiff, the CPC will only be issued upon the compliance of specifications/approvals by the local authority, construction drawings and contract specification.

Security/supporting documents:

– A First Party Second Fixed Charge over two (2) land titles identified as H.S.(D) No. 61423 PT No. 3901 and H.S.(D) No. 58240 PT No. 3304, all situated in Bandar Ulu Kelang, Daerah Gombak, State of Selangor and owned by the plaintiff.

– A third fixed and floating charge over all the present and future fixed and floating assets of the plaintiff.

– A second irrevocable Deed of Assignment over all end-finance proceeds on the proposed Festa Condominium comprising of 1,099 units of condominium to be developed on lands identified as H.S.(D) No. 61423 PT No. 3901 situated in Bandar of Ulu Kelang, Daerah Gombak, State of Selangor and owned by Permodalan Negeri Selangor Berhad.

– Joint and Several Guarantee by Dato' Tee Ah Seng (NRIC No. 510124-10-5833) and Mr Tee Kim Hock (NRIC No. 590806-10-5657). The guarantors shall further undertake to inject the necessary funds in the event of any cost overrun during the implementation of the project.

– Subordination of all shareholders' and directors' advances to the bank guarantee facilities.

– A first charge on Lot 4450 for development on 1,248 units of condominium (Heros Block), Bandar Ulu Kelang, Daerah Gombak State of Selangor.

– A first charge on H.S.(D) No. 58241 PT No. 3305, Bandar Ulu Kelang, Daerah Gombak, State of Selangor. A first charge on the land held under HS(D) 71661, PT 4921, Bandar Ulu Kelang, Daerah Gombak, State of Selangor measuring approximately 44,313 square meters.

[12] On 31 December 2019, the appointed architect issued the certificate of practical completion ('CPC') to the main contractor. However, the plaintiff alleged that there were 'irregularities' in the manner the CPC was issued on, among others, the following reasons:

(a) there were a substantial number of incomplete and defective works which are not in conformity with the specifications by the local authority, construction drawings and contract specification;

(b) failure on the part of the main contractor to properly construct expansion joints on ground floor to level 3 resulting in severe ponding issues;

(c) failure of the main contractor to use materials in compliance to Pengurusan Air Selangor's requirements for all the piping used to receive water meters for the residential units resulting in the plaintiff having to change all 1,099 units piping to comply with Air Selangor's requirements; and

(d) failure of the main contractor to seal all the voids in the riser rooms.

[13] After the CPC was issued by the appointed architect, the main contractor invoked the bank guarantee. The defendant then paid the bank guarantee in the sum of RM476m to the main contractor through MBSB Bank Bhd.

[14] Pursuant to the issuance of the bank guarantee by the defendant, the defendant then issued a letter of offer dated 6 August 2020 for a term loan facility in the sum of RM476m for the purpose of reimbursing the defendant for the amount paid arising from the call of the bank guarantee by the main contractor.

[15] On 25 September 2023, the plaintiff received three letter of demands from the defendant's solicitors, Messrs Shook Lin & Bok demanding RM161,320,568.36, RM35,731,883.07 and RM81,484,072.18 respectively to be paid by 9 October 2023. On 9 October 2023, the plaintiff issued a letter to the defendant's solicitors requesting for an extension of time for the payment of the loan facility.

[16] On 10 October 2023, the defendant's solicitors issued a letter to the plaintiff stating that the defendant allowed the extension of time and further requested for settlement proposal by 16 October 2023.

[17] On 16 October 2023, the plaintiff submitted a payment proposal with explanations on the background and issues of the project that caused the repayment delays. However, the defendant's solicitors then issued a letter dated

18 October 2023, to the plaintiff stating that the defendant is unable to accede to the plaintiff's request for deferment of payment of arrears and not agreeable for time to be granted until the middle of 2024.

[18] On 1 November 2023, the plaintiff informed the defendant's solicitors by way of a letter dated 1 November 2023, that the plaintiff and the defendant were in the midst of negotiation for settlement and will put forth a settlement proposal by 15 December 2023. On 14 November 2023, the plaintiff proposed for repayment in the sum of RM37m in 2023 and RM500m to be paid in 2024. With this, a total of RM537m will be repaid by the end of 2024.

[19] Subsequently, the defendant's solicitor issued a letter of demand dated 20 November 2023, demanding for the payment of RM936,644,754.19 by 30 November 2023 failing which the defendant will proceed to immediately take all steps to recover all monies due and owing under the loan facility and enforce all security agreements. However, the plaintiff failed to make any payment to the defendant.

[20] On 29 November 2023, the plaintiff commenced legal proceedings against the defendant at the High Court of Shah Alam via Suit No BA-22NCVC-490–11 of 2023 ('the suit'). Concurrently with the filing of the suit, the plaintiff sought an interim injunction against the defendant to, inter alia, restrain the Bank from enforcing the security agreements and the security documents related thereto against the plaintiff and from filing a winding up petition against the plaintiff.

[21] On 30 November 2023, the High Court allowed the plaintiff's ex parte application for an interim injunction.

[22] On 26 March 2024, after the inter partes hearing, the learned judicial commissioner dismissed the injunction application with costs of RM5,000 to be paid by the plaintiff to the defendant.

[23] The learned judicial commissioner in her judgment, inter alia, held that the plaintiff failed to establish a serious issue to be tried, there was no unconscionable conduct on the part of the defendant in releasing the bank guarantee and the plaintiff has failed to make full and frank disclosure when the ex parte interim injunction was obtained by the plaintiff.

[24] Dissatisfied, on 1 April 2024, the plaintiff filed notice of appeal against the said decision.

[25] Pending the disposal of this appeal, plaintiff then filed an application

for an Erinford injunction dated 12 April 2024 in encl 54 at the High Court to preserve the status of this appeal.

[26] On or about the same time, the defendant also filed an application for striking out under O 18 r 19 of the Rules of Court 2012.

[27] On 12 July 2024, the learned judicial commissioner granted the plaintiff's application for an Erinford injunction pending the present appeal and directed that the defendant's application to strike out the plaintiff's action be deferred pending the disposal of the appeal before this honourable court.

SUMMARY OF THE HIGH COURT DECISION

[28] The learned judicial commissioner in her judgment held among others as follows:

(a) plaintiff has failed to establish a serious issue that needs to be tried to grant the interim injunction against the defendant:

(i) the issuance of certificate of practical completion (CPC) is regular;

(ii) the release of RM476m by the defendant to MBSB is proper and unconscionable;

(iii) there is no obligation on the part of defendant to make inquiries of any claim made under the bank guarantee by the beneficiary. Once the beneficiary made demands under the bank guarantee, the plaintiff is bound to make payment (see sections 5.01 and 5.02 to be read together with 7.01(g) of the bank guarantee facilities agreement); and

(iv) before the issuance of the notice of demand dated 28 January 2020 by the defendant, the plaintiff had not protested nor raised any complaints regarding the error on the CPC or fraudulent act on the part of defendant in releasing the bank guarantee.

(b) the plaintiff's application for interim injunction should not be granted on the basis of unconscionability:

(i) the issue relating to a joint site inspection was never raised by the plaintiff prior to the filing of this suit;

(ii) there was also no communication between parties regarding allegation of negligence on the part of defendant in releasing the RM476m under bank guarantee to the beneficiary; and

(iii) plaintiff failed to show any unconscionable conduct by the defendant in releasing the bank guarantee to MBSB. defendant is

bound to adhere to the terms and conditions in the agreement relating to the bank guarantee.

(c) the plaintiff has failed to disclose all material facts when the ex parte interim injunction was obtained by the plaintiff:

(i) there is failure on the part of the plaintiff to disclose, for example cl 7.01 (g) of the bank guarantee facilities agreement which provided as follows:

> The Lender shall at all times entitled to make any payment under the BG upon demand by the beneficiary named in such BG without further investigation or enquiry and need not concern itself with the propriety of any claim made under or in the manner required under the BG. The Borrower hereby acknowledges and confirms that it shall not entitled whether at law or equity to stop or demand the Lender to withhold any payment which is to be made by the Lender under or pursuant to any BG hereunder.

(d) the plaintiff has failed to fulfil the threshold for an interim injunction against the defendant. The balance of convenience favoured refusal of the injunction.

PRINCIPLES OF LAW ON INTERLOCUTORY INJUNCTION

[29] In the application of an interlocutory injunction, we are guided by the principle enunciated by the Supreme Court in the case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; [1995] 1 CLJ 461 where the court led as follows:

> [5] at an interlocutory proceeding for an injunction the court must be satisfied that there is a serious issue to be tried, which issue, before anything else, must first be established by the applicant.

[30] The famous *American Cynamid* principles which was derived from the English case of *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and consistently applied by the Malaysian courts as found in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 which sets out the guiding principles for an interlocutory injunction. The Court of Appeal through the judgment delivered by Gopal Sri Ram JCA held as follows:

> To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies

with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors u Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

THE PLAINTIFF'S CONTENTION

[31] The plaintiff submits that there are serious questions be tried which are as follows:

(a) there are irregularities in the issuance of the CPC despite defective and incomplete works by the main contractor;

(b) the call of the bank guarantee by the main contractor is irregular as there was no site joint inspection and handing over of the works to the plaintiff;

(c) the CPC was wrongly issued by the appointed architect as there were numerous defects and incomplete works by the main contractor;

(d) the call of the bank guarantee by the contractor is unconscionable. The interest rate charged by the defendant is grossly excessive from the BNM's guidelines;

(e) there is positive action on the part of the plaintiff to settle the loan facility. The plaintiff was actively engaged in negotiations and providing proposed loan repayment schedule to resolve the matter at hand;

(f) the plaintiff would suffer irreparable damage if the defendant enforces the security agreement namely the debenture(s) and power of attorney(s). If the defendant exercises its rights under the debenture(s), a receiver and manager will be appointed to manage the plaintiff including the sale of the project;

(g) if the status quo is not maintained and the defendant enforces the security agreement, the plaintiff's land will be sold and this would affect the plaintiff's prospect of gaining profits in the future; and

(h) the balance of convenience lies with the plaintiff.

OUR DECISION

[32] Having appraised ourselves of all the above established and entrenched legal principles and the relevant provision of the law, the appeal records, written and oral submissions of parties and the grounds of judgment by the learned judicial commissioner, we find no bona fide serious question to be tried that would warrant an injunction to be granted. We shall now give our reasons.

[33] It must be noted that the defendant is not a party and/or privy to the underlying contract entered into between the plaintiff and the beneficiary. The defendant as a financier has no duty to investigate any 'irregularities' (if any) in the issuance of the certified CPC by the project's architect before making payment of RM476m under the bank guarantees. Once the beneficiary made a demand under the bank guarantees, the defendant was bound to make the necessary payment.

[34] In *Cheah Swee Fah v Bank Bumiputra Malaysia Bhd & Anor* [2007] 7 MLJ 481, the Court of Appeal through the judgment delivered by

Zulkefli JCA (as he then was) held as follows:

> [7] We agree with the finding of the learned judge of the High Court that to impose on the bank any duty to ascertain the actual situation at the site or even for it to make inquiries would indeed place an onerous duty on the bank. It is our judgment that in the absence of clear evidence that the first defendant was aware of the actual situation, or that being aware that there was something amiss in the architect's certificate, when it made the payment, it could not be said that the first defendant was in breach of any of its duties.
>
> [8] It must be noted in this case that it was an express term of the contract enteredinto between the plaintiff and the first defendant that funds were to be released direct to the developer's account against the architect's certificate. The relevant term of the loan agreement under the heading 'Availability of Loans/Mode of Advance' reads: Funds to be released direct to the developer's account as against the architect's certificate upon compliance of the following:
>
> (1) after all legal and charge documents have been duty executed and presented for registration and the property confirmed free from encumbrances by solicitors at the time of presentation;
>
> (2) after all difference between the purchase price and the loan approved has been paid and confirmed by the developer;
>
> (3) after a processing fee of RM200 has been paid.
>
> [91] Thus, under the terms of the contract there was no duty on the part of the first defendant to go behind the architect's certificate. Neither was the first defendant competent to do so. On 22 October 1982, the plaintiff created a first legal charge against the property held under HS(D) 26886, PT No 586 Section 94 Kuala Lumpur in favour of the first defendant as a security for the loan of RM138,600. By the terms of the charge the plaintiff certified that he had received the said sum from the first defendant. In the premises it cannot be said the plaintiff had not received the loan. It follows that he is liable to pay the loan in full. The allegation that the first defendant had been negligent and/or reckless in managing the finance of the housing project is tantamount to putting an extra duty on the first defendant of its contractual obligation both under the contract and under the charge.

[35] In *Karya Lagenda Sdn Bhd v Kejuteraan Bintai Kindenko Sdn Bhd & Anor* [2008] 6 MLJ 636; [2009] 2 CLJ 1 the Federal Court through the judgment delivered by Ahmad Fairuz CJ (as he then was) held as follows:

> [10] Referring to the High Court decision of the instant case, the High Court held 'The words 'as provided by the letter of guarantee' clearly bear the meaning that the demand made by the second defendant is based on the said letter of guarantee. This is sufficient as the basis of a demand made on a bank guarantee'. In the Court of Appeal judgment of the instant case, it was held that:
>
> ... We are of the view, since the bank guarantee being an unconditional and 'on demand' bank guarantee there is no necessity for the demand letter as contended by the first defendant to expressly state that the first defendant had failed to perform or breached the underlying building contract. Hence, the High Court

judge's finding on this issue is not erroneous. Therefore it is clear that in the instant case, both the High Court and the Court of Appeal had applied the principle in *Teknik Cekap* where there is no requirement that a beneficiary must assert expressly and clearly that the contractor had failed to perform or had committed a breach of the underlying contract. A demand is sufficient to trigger payment. We fully agree with the ruling made by the High Court and the Court of Appeal.

[11] An on-demand guarantee is independent of the underlying contract. It must be emphasised that the bank guarantee to which the 1st and 2nd respondent are a party to, is a distinct legal document from the underlying contract which is an agreement between the appellant and the 1st respondent. The courts in an on demand type bond will not inquire into any breach in the underlying contract.

[12] Therefore once a valid demand is issued the second respondent bank in the instant case must make payment to the first respondent because the bank has no right to object since the appellant's grievances are matters that must be adjudicated elsewhere.

[36] The payment of the guaranteed sum under the bank guarantees was honoured by the defendant almost four years ago ie on 30 January 2020. At all material times, the plaintiff did not raised any complaint, protests or grievances regarding the alleged irregularities of the certified CPC or the payment made by the defendant under the bank guarantees and the plaintiff did not file any injunction to restrain the payment or receipt of the bank guarantees sums.

[37] Hence, the allegation by the plaintiff that the defendant was duty bound to conduct investigation or enquiry regarding the propriety of any claim made under the bank guarantee is truly unacceptable and merely an afterthought.

[38] On this matter, it is pertinent again to refer to sections 5.01 and 5.02 to be read together with section 7.01(g) of the bank guarantee facilities agreement which speak volume. Section 7.01(g) of the bank guarantee facilities agreement reads:

The Borrower acknowledges and agrees that the Lender's obligation under any BG issued hereunder is absolute and unconditional and requires payment to the beneficiary named in such BG upon first written demand thereof by the beneficiary named in such BG notwithstanding any objection on the part of the Borrower. The Lender shall at all times entitled to make any payment under the BG upon demand by the beneficiary named in such BG without further investigation or enquiry and need not concern itself with the propriety of any claim made under or in the manner required under the BG. The Borrower hereby acknowledges and confirms that it shall not entitled whether at law or equity to stop or demand the Lender to withhold any payment which is to be made by the Lender under or pursuant to any BG hereunder.

[39] Turning to the next issue, the plaintiff submitted that their application for interim injunction should be granted on the basis of unconscionability.

[40] With respect, we beg to differ. On this point, the learned judicial commissioner in her written grounds of judgment had this to say:

> [45] It is observed that there was also no communication between parties regarding allegation of negligence on the part of defendant in releasing the RM476m under bank guarantee to the beneficiary. After 30 January 2020 until October 2023, the contemporaneous documents indicated these facts:
>
> (i) plaintiff requested for the term loan facility from the defendant to reimburse the RM476m.
>
> (ii) the plaintiff signed the security for charge to secure the term loan granted by the defendant.
>
> (iii) the plaintiff failed to pay the instalment for principal loan under the term loan facility and there was a letter of demand issued by the defendant.
>
> (iv) there was a request made by the plaintiff to defer the payment due to the defendant.
>
> [46] This court conclude that there was no element of unconscionability in the defendant's conduct in releasing the bank guarantee to MBSB. defendant is bound to adhere to the terms and conditions in the agreement relating to the bank guarantee.
>
> [47] In this present case the plaintiff failed to show any facts which could amount to unconscionable conduct by the defendant in releasing the bank guarantee to MBSB.

[41] In *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; [2012] 3 CLJ 401, the Federal Court through the judgment delivered by Abdull Hamid Embong FCJ (as he then was) held as follows:

> The principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense (*Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor*; *Focal Asia Sdn Bhd & Anor v Raja Noraini Raja Datuk Nong Chik & Anor*). Thus, unconscionability may now be raised as a distinct ground. The determination on whether unconscionability applies in a particular case would therefore depend largely on the material facts.

[42] We share the same view and fully agree with the findings made by the learned judicial commissioner. The learned judicial commissioner had rightly concluded based on the evidence presented before her that unconscionability had not been proven to maintain the injunction granted. We see no reason to disturb her findings of this matter.

[43] On the issue of failure by the plaintiff to made a full and frank disclosure when obtaining the ex parte injunction order, in our considered view, the plaintiff intentionally omitted to state the bank guarantee facilities agreement dated 20 March 2009, which expressly states that the bank guarantees were unconditional and were on-demand bank guarantee and the defendant is required to make payments under the bank guarantees upon the beneficiary's demand without further investigation or concern regarding the propriety claim. In addition, the plaintiff also did not disclose that it was already in default under the letter of demand dated 25 October 2023 and although discussions and negotiations were entered into between the parties, the same was unsuccessful and no concluded settlement was reached between the parties. Even if there was a mutual determination, it does not alter the fact that the money is payable on a written demand under and pursuant to the said bank guarantee. Very importantly, if the bona fide of the application is in doubt, then it must be dismissed in limine

[44] To our mind, the plaintiff conduct of not revealing the above material facts was solely done to protect their own interest and not done in good faith. As a result, the plaintiff is not entitled to seek the aid of this honourable court as they have not come with a clean hand.

[45] On the issue of material non-disclosure of relevant facts, in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316, the Court of Appeal through the judgment delivered by Richard Malanjum JCA (as he then was) held as follows:

> It is trite law that in any ex parte application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant. In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 His Lordship Bingham J (as he then was) said this at p 437:
>
> > Failure to make full and fair disclosure
> >
> > The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed, the court

may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. Most of these principles are established by authorities such as *Rex v The Kensington Income Tax Commissioners* [1917] 1 KB 486*; Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289*; Wardle Fabrics Ltd v G Myristis Ltd* [1984] FSR 263*; BankMellat v Nikpour* [1985] FSR 87. The other principles have not been the subject of detailed challenge (see also: *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527; [1994] 1 CLJ 264 where KC Vohrah J (as he then was) referred to the forgoing case).

[46] Thus, it is clear beyond doubt that the balance of convenience lies with the defendant and not the plaintiff. Having disbursed the term loan facilities to the plaintiff, the sum outstanding to the bank under the term loan facilities is RM936,644,754.19 as at 20 October 2023. The defendant is entitled to enforce its rights and remedies under the loan documents to recover the sum due, owing and payable to the defendant by the plaintiff under the term loan facilities following the plaintiff's own default.

[47] Lastly, the plaintiff contended that the bank's prime lending rate was grossly excessive and inconsistent with the guidelines by the Central Bank of Malaysia. Unfortunately, the plaintiff has not shown to us how such interest that was agreed by the plaintiff at the outset to be purportedly excessive. We find no merit in this argument. To us, such bare allegation was merely an afterthought.

CONCLUSION

[48] In the premise, we dismiss the present appeal with costs of RM10,000 (subject to allocator).

[49] We uphold and affirm the decisions made by the High Court.

Appeal dismissed and the High Court's decision allowed.

Reported by Ashok Kumar